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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 139

DIAMOND KIMM, PETITIONER

v.

RICHARD C. HOY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. V, 3–17;[1] Pet. App. 2a–18a) is reported at 263 F. 2d 773. The findings of fact and the conclusions of law of the district court (R. I, 36–41) are not reported.

[1] The Record, which, as lodged in this Court, includes five volumes, is designated "R." Volume I includes various documents related to the proceedings in the district court. Volume III contains a transcript of the pretrial proceedings. Volumes II and IV constitute the transcript of proceedings in the district court. Volume V includes the proceedings in the court of appeals. The transcript of proceedings before the hearing officer of the Immigration and Naturalization Service is included in Defendant's Exhibit A which has been filed in this Court, and is designated "Tr."

JURISDICTION

The judgment of the court of appeals (R. V, 18; Pet. App. 1a) was entered on February 19, 1959. A petition for rehearing was denied on March 30, 1959 (R. V, 19). The petition for a writ of certiorari was filed on June 24, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner, being deportable for failure to maintain the exempt status of a student, applied for the discretionary relief of voluntary departure or suspension of deportation. In the hearing on this application, petitioner declined, on the advice of counsel, to answer whether he was or ever had been a member of the Communist Party on the basis of the First and Fifth Amendments. Petitioner's application was denied on the ground that he had failed to establish, as required by the statute, that he was not an alien deportable because of membership in the Communist Party. The question presented is whether the denial of petitioner's application constituted an improper exercise of the authority to determine a deportable alien's eligibility for discretionary relief.

STATUTES INVOLVED

The Act of July 1, 1948, 62 Stat. 1206, amending Section 19(c) of the Immigration Act of 1917, provided:

> (c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States

> and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. * * *

The Act of June 28, 1940, Section 20(d), 54 Stat. 670, 672, amending Section 19(d) of the Immigration Act of 1917, provided:

> (d) The provisions of subsection (c) shall not be applicable in the case of any alien who is deportable under (1) the Act of October 16, 1918 (40 Stat. 1008 [1012]; U.S.C., title 8, sec. 137) entitled "An Act to exclude and expel from the United States aliens who are members of the anarchist and similar classes," as amended; * * *.

At the time of the consideration and decision of petitioner's application for discretionary relief, the Act of October 16, 1918, to which Section 19(d) of the Immigration Act of 1917, as amended, referred, had

been amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006–1008, to read:

> [Sec. 1] That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * * * *
>
> (2) Aliens who, at any time, shall be or shall have been members of any of the following classes:
>
> * * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state, (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt:
>
> * * * * * *

Sec. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in * * * section 1 (2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The

provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

STATEMENT

On April 17, 1953, the Board of Immigration Appeals, adopting the findings of the trial examiner, *found that petitioner was subject to deportation* for failing to maintain his exempt status as a student.[2] The Board, however, allowed petitioner to depart voluntarily "within 90 days following the issuance to him of the exit permit, or within 90 days following the date on which exit permits cease to be required in such cases, whichever shall come sooner." (Pet. App. 1a–2a). Since exit permits were required only during World War II and no such permit was issued to petitioner, he was not then required to depart. On May 19, 1949, the District Director of Immigration wrote petitioner informing him that his case was being reopened to permit him to apply for the benefits provided by the Act of July 1, 1948, amending Section 19 (c) of the Immigration Act of 1917 (*supra*, pp. 2–3) relating to the suspension of deportation. On June 6, 1950, the District Director wrote petitioner that he was being given a new hearing to determine his deportability as a result of this Court's decision in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, holding that administrative proceedings for the deportation of aliens must conform to the requirements of the Administrative Procedure Act, 5 U.S.C. 1001–1011. At the hearing on June 16,

[2] The earlier proceedings are described in greater detail in the opinion of the court of appeals (Pet. App. 2a–7a).

1950, petitioner's counsel asked for a continuance which was granted.

The hearing was resumed on October 2, 1950. After some questions as to petitioner's various residences and those of his family, the hearing officer asked petitioner's counsel if his client was applying for suspension of deportation, and counsel replied, "That's right." The hearing officer then stated that "[a]s your client is applying for a relief within the discretion of the Attorney General the Examining Officer may inquire into any of his residence or any of his business while within the United States" (Tr. 9–13; Pet. App. 7a). Subsequently, petitioner's counsel stated (Tr. 15; Pet. App. 7a):

> My understanding of this hearing and the purposes of it are to determine what the respondent has done, and whether he comes under the discretionary relief applied for * * *.

After testimony by petitioner as to the various jobs he had held and his assets (Tr. 13–16), this colloquy occurred (Tr. 17):

> EXAMINING OFFICER TO RESPONDENT:
>
> Q. Mr. Kimm, are you a member of the Communist Party?
>
> COUNSEL:
>
> Mr. Hearing Examiner, I object to the question. I object to the question on the ground that it is in violation of the first and fifth amendments. I object to it on the ground that it is in violation of self-incrimination under the Smith Act and possibly under the McCarran Bill.

HEARING EXAMINER TO COUNSEL:

> As I have stated before the respondent is applying for a relief within the discretion of the Attorney General and the government is entitled to know the complete history of the respondent in order that a fair decision may be rendered. The objection is overruled without prejudice to counsel advising her client not to answer.
>
> * * * * *
>
> Let the record show that the respondent does not answer on advice of counsel.

At the final hearing on January 15, 1951, petitioner's attention was called to the question which he had refused to answer on October 2, 1950—"Mr. Kimm, are you a member of the Communist Party?"—and he again declined to answer on the ground of possible self-incrimination. For the same reason, petitioner also refused, on the advice of counsel, to answer whether he had ever been a member of the Communist Party of the United States (Tr. 43, 55–56).

In a decision dated January 15, 1951 (included in Defendant's Exhibit A), the hearing officer concluded that petitioner was deportable on the charge that he had remained in the United States after failing to maintain the exempt status of a student under which he was admitted. With respect to petitioner's application for discretionary relief, the hearing officer found (Pet. App. 8a):

> (2) That the respondent has failed to prove that he has been a person of good moral character for the past 5 years;

(3) That the respondent has declined to answer questions as to whether he has been a member of a proscribed organization, on the ground of self-incrimination;

(4) That the respondent has resided in the United States continuously for 7 years or more and was residing in the United States on July 1, 1948;

(5) That the respondent declines to answer questions on the ground of self-incrimination which might establish that the respondent is deportable on grounds specified in Section 19(d) of the Immigration Act of 1917, as amended [*supra*, p. 3].

The hearing officer further elucidated the relation of these findings to the factors relating to discretionary relief:

The provisions of Section 19(c) (1) and (2) of the Immigration Act of 1917, as amended [*supra*, pp. 2–3], provide that certain relief may be granted aliens within the discretion of the Attorney General. This relief is purely discretionary with the Attorney General and no right to the relief vests with the alien. In considering an alien for discretionary relief the Government of the United States is entitled to know his entire background and whether or not he is or has been a member of a proscribed organization, and any information which would show whether or not he is a person to whom the discretionary relief provided in Section 19(c) should be extended. By declining to answer questions as to whether he had ever been a member of a proscribed organization, on the ground of self-incrimination, the respondent de-

> nies [sic] the government of knowledge to which it is entitled and the respondent places himself in a class of aliens to whom discretionary relief as provided by Section 19(c) of the Immigration Act of 1917, as amended, is not available.
>
> In view of the foregoing it must also be deemed that in view of his failure to answer the questions propounded the respondent has not affirmatively proved that he has been a person of good moral character for the past five years.

The hearing officer accordingly concluded (Pet. App. 9a–10a):

> (1) That under Section 19(c)(1) of the Immigration Act of 1917, as amended, the respondent has failed to establish statutory eligibility for voluntary departure in lieu of deportation;
>
> (2) That under Section 19(c)(2) of the Immigration Act of 1917, as amended, the respondent has failed to establish eligibility for suspension of deportation.

He further concluded that the order of April 17, 1943, granting voluntary departure should be withdrawn.

On March 13, 1951, the Acting Assistant Commissioner adopted the recommendations of the hearing officer and ordered petitioner deported (the opinion is included in Defendant's Exhibit A).

The Board of Immigration Appeals, in an opinion dated January 22, 1952 (included in Defendant's Exhibit A), dismissed petitioner's appeal. With respect to petitioner's refusal to answer questions as to Communist Party membership, the Board stated:

> The right of a defendant against self-incrimination in a criminal prosecution is not the

> same as the right of this Board to know all pertinent information about an applicant for suspension of deportation. This is not a criminal prosecution. Respondent is asking a special favor and must be willing to permit a thorough examination of his eligibility for that favor. Membership in the Communist Party, present or past, is most pertinent to an application for suspension, because under Section 19 (d) of the 1917 Act and under Section 22 of the Internal Security Act, amending the Act of 1918 [*supra*, pp. 3–5] Communist Party membership precludes a grant of suspension or of any relief, including voluntary departure.

The Board also sustained the denial of petitioner's application for voluntary departure on the ground that petitioner had been granted this privilege by the order of the Board in 1943 (quoted by the court of appeals (Pet. App. 4a–5a)) and had deliberately failed to use it:

> The order of this Board of April 17, 1943, quoted above, gave the right to voluntary departure from this country at times as specific as possible under the circumstances then existing. It was a generous order, designed to inconvenience respondent as little as possible. It does not mean that the order gave respondent the right to depart voluntarily from the United States at any time then or in the future that he might choose. We are informed by the Department of State that exit permits ceased to be required in October 1948. Respondent neglected to depart from the United States within 90 days after the time that exit visas became no longer necessary. The responsibility was on respondent to inform himself when exit visas ceased to be required.

> As for counsel's statement that the Government has "no right to deprive" respondent of voluntary departure, the alien has been in the United States on sufferance for 14 years. He has been adequately warned repeatedly of his position. Voluntary departure is a privilege; it is not a right. It was granted him once, and he failed to avail himself of the privilege. We are not going to grant it again.

Petitioner thereafter filed this suit in the District Court for the Southern District of California for review of the deportation order and for injunctive relief (R. I, 22–27; R. V, 10). The district court upheld the decision of the Board of Immigration Appeals concluding that petitioner had failed to establish eligibility for discretionary relief (R. I, 36–41). On appeal (R. I, 42), the court of appeals unanimously upheld the hearing officer's findings (R. V, 3–18).

ARGUMENT

1. Petitioner suggests (Pet. 7) that he was found ineligible for suspension of deportation and voluntary departure on the ground that he had failed to prove good moral character. In fact, however, the only issue in this case is whether petitioner's refusal to answer questions concerning Communist Party membership justified a determination that he had failed to establish that he was not ineligible for suspension of deportation[3] under the Act of June 28,

[3] The decision of the Board denying voluntary departure also rested on an independent ground, which, we submit, adequately supports the Board's denial of that relief wholly apart from the question of the effect of petitioner's refusal to answer certain questions. The Board concluded (*supra*, pp. 10–11) that petitioner, having deliberately failed to avail himself of the voluntary departure allowed by its 1943 order, was not en-

1940 (*supra*, p. 3), precluding discretionary relief to aliens deportable for Communist Party membership. Since the hearing officer found (*supra*, p. 9) that petitioner had failed to establish his eligibility both under the Act of July 1, 1948 (*supra*, pp. 2–3) (good moral character) and the Act of June 28, 1940 (Communist Party membership), his decision must be sustained if either ground is valid. Moreover, the decision of the Board of Immmigration Appeals (*supra*, pp. 9–10) rests on petitioner's failure to establish his eligibility under the Act of June 28, 1940, and not on any failure to prove good moral character. The Board's decision is the final and controlling one.

2. Petitioner also assumes (Pet. 7) that he was improperly found ineligible for discretionary relief solely because his refusal to answer questions about Communist Party membership, on the basis of the First and Fifth Amendments, was considered as proof of guilt. He claims (Pet. 7) that such "declination * * * was not evidence, nor could it justify any inference of guilt." This statement of the proceedings is incorrect. While the hearing officer and the Board of Immigration Appeals largely, if not entirely, based their determinations on the refusal of petitioner to answer questions pertinent to the statutory standards of eligibility, they did not conclude that the refusals to answer constituted evidence of guilt as to any criminal or deportable offense or even justified an inference of such guilt. On the contrary, the hearing officer

titled to have the privilege granted again. In our view, therefore, the issue raised by petitioner here only affects the determination that he failed to establish his eligibility for suspension of deportation.

(*supra*, pp. 8–9) and the Board (*supra*, pp. 9–10) merely found that, by refusing to answer pertinent questions, petitioner had failed to sustain his burden of establishing eligibility for discretionary relief. 8 C.F.R. § 151.3(e) (1949 ed., 1951 Supp.) (15 Fed. Reg. 7638) (now 8 C.F.R. § 242.16(e)); see *Brownell* v. *Cohen*, 250 F. 2d 770, 771 (C.A.D.C.). In other words, the hearing officer and the Board concluded that petitioner cannot establish his eligibility for discretionary relief—which it is his burden to do—by testifying to certain facts, while depriving the Government of other pertinent and essential information required by the statute.[4]

---

[4] A single sentence in the opinion of the hearing officer could conceivably be read to mean that petitioner had failed to sustain his burden of proof because his refusals to answer demonstrated lack of good moral character:

> * * * it must also be deemed that in view of his failure to answer the questions propounded the respondent has not affirmatively proved that he has been a person of good moral character for the past five years.

As so read, this determination might raise questions under the decisions of this Court in *Slochower* v. *Board of Education*, 350 U.S. 551, and *Konigsberg* v. *State Bar*, 353 U.S. 252, 270–271. But, in context (see the previous paragraph of the opinion (*supra*, pp. 8–9)), it is clear that the hearing officer meant merely that petitioner could not be found to have sustained his burden of proof when his refusal to answer had prevented the government from obtaining necessary information concerning Communist Party activities which could establish his ineligibility for discretionary relief, under the Act of July 1, 1948 (good moral character) (*supra*, pp. 2–3) as well as under the Act of June 28, 1940 (deportability for Communist Party membership) (*supra*, p. 3). In any event, the correctness of the decisions of the hearing officer and Board do not rest on petitioner's failure to prove good moral character (see *supra*, pp. 11–12).

3. While this Court has never considered the particular question raised in the instant case, it has in several decisions discussed the effect which governmental agencies can give, under the First, Fifth and Fourteenth Amendments, to refusals to answer questions asked by the same or other governmental agencies. In *Slochower* v. *Board of Education*, 350 U.S. 551, the Court held that the automatic dismissal of a school teacher for refusing to testify before a federal legislative committee on the ground of the Fifth Amendment violates due process. In reaching this conclusion, the Court held that the exercise of the privilege against self-incrimination does not justify a governmental agency in finding a confession or even an inference of guilt. *Id.* at 555–557. But this Court also indicated that not all governmental action predicated on refusal to answer proper questions would violate due process, even though the silence was accompanied by invocation of the Fifth Amendment. Thus, it was suggested that it is important in deciding the constitutional validity of such governmental action whether "the plea resulted from mistake, inadvertence or legal advice conscientiously given * * *." *Id.* at 558. More important, the Court indicated that a school teacher might validly be dismissed for refusal to answer pertinent questions which are "part of a bona fide attempt to gain needed and relevant information" concerning the fitness of the teacher. *Ibid.*

These implications of *Slochower* have been made clearer by the subsequent decision in *Beilan* v. *Board of Education*, 357 U.S. 399. There, the Court up-

held the discharge of a school teacher for "incompetency" based on his refusal to answer questions involving Communist Party activities asked by the Superintendent of Schools despite the teacher's contention that to do so interfered with his rights under the First Amendment.[5] The Court stated that the person questioned must be given some indication that governmental action may result from his refusal to answer (*id.* at 408; see *Lerner* v. *Casey*, 357 U.S. 468, 478)[6] and that refusal to answer cannot justify any inference of guilt. 357 U.S. at 409; see also *id.* at 409–411 (Mr. Justice Frankfurter

[5] While the teacher did not squarely invoke the First Amendment in refusing to answer, he did refuse to answer "questions about political and religious beliefs * * *." 357 U.S. at 401. Moreover, Beilan explicitly claimed in arguing his case in this Court that his discharge violated his right under the First Amendment. See Brief for Petitioner, No. 63, O.T. 1957, pp. 19, 32. The Court indicated that despite Beilan's claim of interference with his First Amendment rights (357 U.S. at 405), the superintendant still had the right to ask the questions and discharge the employee when he refused to answer. It is important to note that the Court's decision is not based on any determination that the First Amendment was improperly invoked. Cf. *Barenblatt* v. *United States*, No. 35, O.T. 1958, decided June 8, 1959.

[6] In the *Lerner* case, the Court upheld the discharge of a city employee as a result of his refusal to answer questions asked by the city on the ground of the Fifth Amendment. Unlike *Beilan*, however, the Court's decision was based, in part, on the ground that the Fifth Amendment does not apply through the Fourteenth Amendment to state proceedings and that therefore the employee had no constitutional right to silence. 357 U.S. at 478–479. But the Court did hold that refusal to answer justified the city's conclusion that the employee was of "doubtful trust and reliability."

concurring); *Lerner* v. *Casey, supra,* 357 U.S. at 475. In sum, this Court has held that governmental action may be based on a refusal to answer, even when a constitutional right to silence may be involved, where the governmental agency has a strong interest in the questions asked, where the person questioned is protected from mistake or surprise, and where the governmental action is not a determination of guilt based on the refusal to answer.

The decisions of the hearing officer and the Board of Immigration Appeals are fully consistent with the principles stated in *Slochower*, *Beilan*, and *Lerner*. First, the questions concerning Communist Party membership were very clearly pertinent to the statutory provision flatly prohibiting all discretionary relief to aliens deportable on the ground of Communist Party membership (Act of June 28, 1940, *supra*, p. 3; Internal Security Act of 1950, § 22, *supra*, pp. 4–5). Second, petitioner's refusal to answer was given on the advice of counsel notwithstanding the statement by the hearing officer overruling the refusal to answer on the ground that the government "is entitled to know the complete history of [petitioner] in order that a fair decision may be rendered" (*supra*, p. 7). Third, as shown above (*supra*, pp. 12–13), the hearing officer and the Board made no conclusion and did not draw an inference of "guilt" of Party membership from the refusal to answer.

Moreover, in the instant case, there are other significant factors justifying the administrative deter-

mination that petitioner had, by reason of his refusal to answer pertinent questions, failed to establish his eligibility for suspension of deportation. First, unlike the cases involving the discharge of government employees, the burden of proof was on petitioner. He was found ineligible for discretionary relief for failing to sustain this burden, without any affirmative determination of incompetence, unreliability, bad moral character, or Communist Party membership (*supra*, pp. 12-13). Second, it has long been held by this Court that deportation proceedings, being civil in nature, are not bound by the strict requirements of criminal prosecutions. Thus, the Court has allowed adverse factual inferences to be drawn in a deportation proceeding from the refusal of the alien to answer questions. *Bilokumsky* v. *Tod*, 263 U.S. 149, 153-155; *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 111-112.[1] And, third, discretionary relief from deportation has been held to be "'an act of grace'" *Jay* v. *Boyd*, 351 U.S. 345, 354.

4. Petitioner relies heavily (Pet. 7) on an alleged conflict between the determination that he had not established eligibility for discretionary relief and the decision of this Court in *Konigsberg* v. *State Bar*, *supra*, 353 U.S. 252. There, the Court held that the due process clause of the Fourteenth Amendment was violated by the refusal of the state to allow Konigs-

[1] These cases, however, do not consider whether an inference may be drawn when the refusal to answer is accompanied by a claim of constitutional right.

berg to practice law where the evidence did not rationally support the two grounds of refusal, *i.e.*, failure to prove that he was of good moral character and that he did not advocate overthrow of the federal or state government by unconstitutional means. In reaching this decision, however, the Court clearly stated that it was not deciding whether the state could have barred Konigsberg solely because of his refusal to answer questions concerning Communist Party activities because it did not believe that this was the rationale underlying the state's determination. *Id.* at 259–262.[8]

The Court did say, however, that if the state "had barred Konigsberg solely because of his refusal to respond to its inquiries into his political associations and his opinions about matters of public interest, then we would be compelled to decide far-reaching and complex questions relating to freedom of speech, press and assembly." *Id.* at 261. But this question, as to whether governmental action may be based on the refusal to answer questions involving Communist Party activities, was subsequently settled by *Beilan* v. *Board of Education, supra.* Moreover, in *Barenblatt* v. *United States*, No. 35, O.T. 1958, decided June 8, 1959, this Court held that the First Amendment does not justify the refusal of a witness before a Congres-

[8] On the other hand, the dissent, disagreeing as to the rationale of the state's determination, stated that the state "was justified in concluding that refusal to answer *these* questions under *these* circumstances means that the applicant has failed to meet the requirement that he set forth his qualifications affirmatively." 353 U.S. at 281.

sional committee to answer questions concerning Communist Party activities. It therefore seems that the First Amendment would likewise not justify an alien, voluntarily applying for discretionary relief from deportation and bearing the burden of showing his eligibility under the statute, in refusing to answer similar pertinent questions asked by the immigration hearing officer acting within his authority, let alone support petitioner's more far-reaching contention that no governmental action of any kind can be based on the refusal to answer.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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BRIEF FOR

PETITIONER

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v.

RICHARD C. HOY, District Director, Immigration and Naturalization Service

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 139

DIAMOND KIMM, *Petitioner,*

v.

RICHARD C. HOY, District Director, Immigration and Naturalization Service

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

OPINION BELOW

The opinion below (R. 89) is reported at 263 F. 2d 773.

JURISDICTION

The judgment below was entered on February 19, 1959 (R. 95). A timely petition for rehearing was denied on March 30, 1959 (R. 95). Petition for certiorari was filed on June 24, 1959, and was granted on October 12, 1959 (R. 96). The jurisdiction of the Court rests on 28 U. S. Code, sec. 1254(1).

STATUTES INVOLVED

The Act of July 1, 1948, 62 Stat. 1206, amending Section 19(c) of the Immigration Act of 1917, provided:

> (c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. * * *

The Act of June 28, 1940, Section 20(d), 54 Stat. 670, 672, amending Section 19(d) of the Immigration Act of 1917, provided:

> (d) The provisions of subsection (c) shall not be applicable in the case of any alien who is deportable under (1) the Act of October 16, 1918 (40 Stat. 1008 [1012]; U.S.C., title 8, sec. 137) entitled "An Act to exclude and expel from the United States aliens who are members of the anarchist and similar classes," as amended; * * *.

At the time of the consideration and decision of petitioner's application for discretionary relief, the Act of October 16, 1918, to which Section 19(d) of the Immigration Act of 1917, as amended, referred,

had been amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006-1008, to read:

> [Sec. 1] That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:
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> * * * * * * * * *
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> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt;
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> Sec. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in * * * section 1 (2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

QUESTION PRESENTED

Whether petitioner was lawfully held ineligible for suspension of deportation because he declined on the basis of the privilege against self-incrimination to tes-

tify in the suspension proceeding whether he was or ever had been a member of the Communist Party.

STATEMENT OF THE CASE

Petitioner, a native of Korea, was admitted to the United States on July 6, 1928, as a non-quota immigrant student under section 4(e) of the Immigration Act of May 26, 1924, as amended, 43 Stat. 155, 45 Stat. 1009. He attended schools in the United States until 1938, receiving baccalaureate and graduate degrees in mining and metallurgy. (R. 75, 80.)

War between Japan and China had broken out in 1937, and petitioner was unwilling to return to Japanese-occupied Korea, where he would have had to contribute to Japan's war machine by working under governmental authority as a technician. Accordingly, after he stopped attending school, he obtained work and remained in the United States. (R. 38, 75-76, 80-81.)

Deportation proceedings were commenced against petitioner in December 1941, culminating in an order of the Board of Immigration Appeals of April 17, 1943. Petitioner was found deportable for having failed to maintain the exempt student status under which he had been admitted. However, as a result of a finding of good moral character for the preceding five years, he was granted permisison to depart voluntarily from the United States. (R. 14-15, 56.)

The privilege of voluntary departure was academic during the war, and petitioner continued to stay and work in the United States (R. 38, 43, 89). In July 1945, he entered the employ of the Office of Strategic Services at its solicitation, and was trained for a secret

mission into Japanese-occupied territory as an American spy. The Japanese surrender came before the mission could be fulfilled, and in September 1945, petitioner was released from the OSS. (R. 48-51, 29.) He then made several applications to the State Department for an exit permit to return to his homeland, but never received a reply (R. 38-40, 78-77).

In April 1949, the Immigration and Naturalization Service ordered petitioner's deportation hearing reopened in order to allow him to apply for suspension of deportation under the amendment of July 1, 1948 (*supra*, p. 2), which liberalized section 19(c) of the Immigration Act of 1917, as amended (R. 53-54, 23, 77).[1] The amendment authorized the Attorney General to suspend deportation for, inter alia, aliens (other than those to whom section 19(d) of the Immigration Act was applicable) who proved good moral character for the preceding five years, were not ineligible for naturalization or (like petitioner) were ineligible solely because of race, had resided continuously in the United States for seven years, and resided in the United States on July 1, 1948. Among the aliens to whom the bar of section 19(d) applied were aliens deportable under the anarchist deportation act of October 16, 1918. This act was amended by section 22 of the Internal Security Act of 1950 to include aliens who had ever been members of the Communist Party. (See *supra*, pp. 2-3.)

At the reopened hearings, held in 1950 and 1951, petitioner applied for suspension of deportation (R. 23,

[1] The 1948 provision remains in effect for suspension applications which, like petitioner's, were made after its enactment and prior to its repeal by the current Immigration and Nationality Act. See the savings clause, sec. 405(a) of the latter Act, 66 Stat. 280; *United States ex rel Accardi* v. *Shaughnessy*, 347 U.S. 260, 261 n. 1.

37). He introduced affidavits attesting to his good character (R. 54, 64) and a letter from the War Department lauding him for his OSS service (R. 66). The Immigration and Naturalization Service introduced a report of an investigation it had made of petitioner. This showed that nothing derogatory had been discovered concerning petitioner's moral character or loyalty to the United States, and that he had a respectable employment history and no criminal record. (R. 59-62, 45.) The Service also introduced an FBI report, which revealed no derogatory information and showed that in 1943 petitioner had been cleared by the War and Navy Departments for employment on classified, confidential or restricted War and Navy Department contracts (R. 63).

Petitioner was questioned at length by a Service representative, whose inquiries were permitted by the hearing officer on the theory that since petitioner was applying for discretionary relief, the government was entitled to know "all of the facts" about him and his "complete history" (R. 31, 34). In the course of the interrogation, the Service representative asked petitioner whether he was or ever had been a member of the Communist Party. On advice of his counsel, petitioner claimed the privilege against self-incrimination and refused to answer. (R. 34, 52-53.) No evidence was introduced that petitioner was or ever had been a member of the Communist Party. Nor was any other evidence introduced derogatory to petitioner or adverse to his application.

The hearing officer recommended denial of suspension and withdrawal of the privilege of voluntary departure on the ground that petitioner, by asserting his privilege to the questions on Communist Party member-

ship, had placed himself "in a class of aliens to whom suspension relief . . . is not available" and had failed to prove the statutory requirement of good moral character for the preceding five years (R. 71-73). The Acting Assistant Commissioner of the Service adopted the hearing officer's recommendations on the ground that as a matter of administrative discretion relief would be denied because of petitioner's claim of the privilege against self-incrimination (R. 74). The Board of Immigration Appeals affirmed because of the petitioner's refusal to answer the questions about Communist Party membership (R. 77-78). We discuss its reasoning later (*infra*, p. 14).

The petitioner brought suit against the District Director of the Service to enjoin deportation, alleging, among other things, that the denial of suspension was illegal (R. 1, 4). The District Court reviewed the administrative record and granted judgment against petitioner (R. 12). On the issue of suspension, the District Court found (R. 10):

> The finding of the hearing officer, as affirmed by the Board of Immigration Appeals, that the plaintiff had not affirmatively proved that he had been a person of good moral character for the past five years, and that he was ineligible for the discretionary relief of suspension of deportation under the provisions of Section 19(c) of the Immigration Act, as amended [8 U.S.C. 155(c) 1950 Ed.], is supported by reasonable, substantial and probative evidence.

The Court of Appeals affirmed on the same grounds (R. 93, 95).

SUMMARY OF ARGUMENT

I.

The Special Inquiry Officer found that petitioner had failed to prove good moral character by reason of refusing to answer the questions on Communist Party membership, and hence was ineligible for suspension under the statute. The District Court and the Court of Appeals sustained this finding.

This was clear error. The refusal to answer on Fifth Amendment grounds was not evidence and did not justify any inference of guilt. The only evidence in the record amply establishes petitioner's good moral character. Nor can reliance on the Constitution be considered disgracing conduct.

II.

A. The court below also held petitioner ineligible because he "failed to sustain his burden" of proving that he was not precluded from suspension by being within the anarchist deportation act, as amended.

Disqualification under the anarchist deportation act is stated in the suspension statute as an exception. Hence the burden of proving such disqualification is on the government. Otherwise the alien would have the burden of proving a negative. Moreover, the statutory text draws a distinction between the preconditions which the alien must prove and the disqualifying factor of coverage under the anarchist deportation act. Since there was no evidence that petitioner was or had been a member of the Communist Party or was otherwise proscribed by the anarchist deportation act, petitioner cannot be held ineligible as disqualified under that act.

B. The Board of Immigration Appeals apparently denied suspension on the ground that petitioner had a duty, which he failed to discharge, to answer the Service's questions relating to the possible applicability of the anarchist deportation act. But nothing in the statute requires, as a term of eligibility, that the alien cooperate with the Service in its investigation of him. Even if a general obligation to cooperate were read into the statute, this would be overridden by the Fifth Amendment, which gives a privilege of silence.

To interpret the statute as conditioning suspension on the alien's non-assertion of his privilege would prefer the dubious policy of the anarchist deportation act over the policy of the Fifth Amendment.

The Court has sustained the power of cities to discharge employees for refusing to answer, on constitutional grounds, questions asked or directed to be answered by the cities. These cases merely sustained the power of the cities to discharge for non-cooperation claimed to evince lack of candor or insubordination. The initial question here, however, is not the power of Congress, but what it did. It did not make non-cooperation a disqualification. Furthermore, whatever may be the case as to state power, which is not limited by the privilege against self-incrimination, the Fifth Amendment prohibits the federal government from inflicting adverse, discriminatory consequences on account of a privileged silence.

III.

It is doubtful that this case presents, in its present posture, the issue of whether the Attorney General abused his discretion. Since the Board of Immigra-

tion Appeals held petitioner ineligible for discretionary consideration, the discretion was not exercised. But if the question is here, it is unconstitutional, and at a minimum an abuse of discretion, for administrative officials to denigrate the Constitution by penalizing or discrediting an alien for exercising his constitutional privilege.

ARGUMENT

I. PETITIONER'S SILENCE ON THE BASIS OF THE PRIVILEGE WAS NOT A VALID GROUND FOR HOLDING THAT HE FAILED TO PROVE GOOD MORAL CHARACTER.

Under the applicable suspension statute, an alien must satisfy certain preconditions before he is entitled to have the Attorney General exercise discretion as to whether to suspend his deportation. In addition, aliens deportable under the anarchist deportation act, as amended, including those who were ever members of the Communist Party, are excepted from relief.

One of the preconditions is that the alien prove good moral character for the five years preceding his application. The Special Inquiry Officer found that petitioner had failed to meet this requirement because of his failure to answer the questions about Communist Party membership (R. 72-73). The District Court (R. 10) and the Court of Appeals (R. 93) sustained the finding.

The finding was clearly wrong. Petitioner's refusal to answer on Fifth Amendment grounds was not evidence and cannot justify any inference of guilt. *Slochower* v. *Board of Education*, 350 U.S. 551; *Grunewald* v. *United States*, 353 U.S. 391, 421. The only evidence in the record amply established petitioner's good moral character, there was no evidence to the

contrary, and the Service's investigation had found nothing derogatory about him (*supra*, p. 6).

In *Konigsberg* v. *State Bar of California*, 353 U.S. 252, a Committee of Bar Examiners rejected an application for admission to the bar on the grounds that the applicant, by refusing to answer questions about Communist Party membership, had "failed to demonstrate that he was a person of good moral character" and had "failed to show that he did not advocate the overthrow the Government of the United States or of the State by force, violence or other unconstitutional means" (at 259). This Court held that the rejection was so arbitrary and discriminatory as to constitute a denial of due process and equal protection. It follows that the determination in this case that petitioner had failed to prove good moral character is invalid.

Furthermore, even if petitioner had answered the questions in the affirmative, there would have been no adequate basis for a finding that he lacked or had failed to prove good moral character. A finding that Communist Party membership ipso facto establishes bad moral character was held in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, to be so arbitrary as to violate due process and the equal protection clause. A contrary view would compel the obviously irrational conclusion that the many millions of Communists throughout the world, including famous scientists, writers, musicians, and artists, are all morally delinquent.

Nor can it be argued that granting that no adverse inference can be drawn from petitioner's silence, nevertheless his assertion of the privilege was itself a disreputable action. It is unthinkable that reliance

upon the Constitution is disgracing conduct. *Grunewald* v. *United States, supra*, held that a claim of the privilege does not reflect on the credibility of a witness. As the concurring opinion there stated (at 425-426), "It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty for invocation of a privilege deemed worthy of enshrinement in the Constitution."

The privilege against self-incrimination was founded in struggles for religious and political liberty, and history is replete with instances in which it was invoked by persons of high morality. At the December 1801 Term, Levi Lincoln, Jefferson's Attorney General, invoked the privilege before this Court. See *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, 144. No one seems to have considered that he thereby incurred discredit. On the contrary, in 1810, President Madison on Jefferson's recommendation offered Lincoln appointment to the Supreme Court. Lincoln declined because of approaching blindness, and the vacancy was filled by Joseph Story. IV *Beveridge, The Life of John Marshall* (1919) 108-10.

II. PETITIONER'S SILENCE WAS NOT A VALID GROUND FOR DISQUALIFYING HIM BY REASON OF THE ANARCHIST DEPORTATION ACT.

A. The Burden of Proving Applicability of That Act Was on the Service, and That Burden Was Not Carried by the Absence of Evidence on the Subject

The court below seems to have also held that petitioner was ineligible because by refusing to answer the questions on Communist Party membership he had "failed to sustain his burden" of proving that

he was not precluded from suspension by being within the anarchist deportation act, as amended (R. 93).

As we have seen, aliens deportable under the anarchist deportation act, as amended (including aliens who ever were members of the Communist Party), were disqualified from receiving suspension of deportation. This disqualification appears in the statutory text as an exception to the general operation of the suspension statute. Hence, under standard principles of construction, the burden of proving the disqualification is on the party claiming that the exception applies. *Schlemmer* v. *Buffalo, R. & P. R. Co.*, 205 U.S. 1, 10; *Javierre* v. *Central Altagracia*, 217 U.S. 502, 508. This principle is fortified in its present application because placing the burden on the alien would require him to prove a negative. Even more important, the statutory scheme shows a clear demarcation between what the alien must prove—these appearing in the text as preconditions to eligibility—and the disqualifying factor of coverage by the anarchist deportation act. Accordingly, the court below was mistaken in its uncritical assumption that petitioner had the burden of proving that he was not deportable under the anarchist deportation act.

In the present case, there is not the slightest evidence that petitioner ever was a member of the Communist Party or was within any other category proscribed by the anarchist deportation act. No suggestion to that effect appears even though he was investigated by the F. B. I. and the Immigration Service. The questions were asked of him not out of suspicion, but as a happenstance in a random inquiry. And, as we have seen, petitioner's assertion of the privilege has no evidentiary significance. Accordingly, the Service's burden

of proving that petitioner was disqualified by reason of being under the anarchist deportation act was not carried.

B. Petitioner's Refusal to Assist the Immigration Service in Determining Whether He Was Under the Anarchist Deportation Act Was Not a Valid Ground for Holding That He Was Ineligible for Suspension

The Board of Immigration Appeals did not rely on the ground, advanced by the Special Inquiry Officer and approved by the District Court and the court below, that petitioner had by asserting the privilege failed to prove good moral character. Its reasoning was as follows (R. 77-78):

> The right of a defendant against self-incrimination in a criminal prosecution is not the same as the right of this Board to know all pertinent information about an applicant for suspension of deportation. This is not a criminal prosecution. Respondent is asking a special favor and must be willing to permit a thorough examination of his eligibility of that favor. Membership in the Communist Party, present or past, is most pertinent to an application for suspension, because under Section 19(d) of the 1917 Act and under Section 22 of the Internal Security Act, amending the Act of 1918, Communist Party membership precludes a grant of suspension or of any relief, including voluntary departure.

As we read this passage, its theory is that petitioner is ineligible because he failed to discharge a duty "to permit a thorough examination of his eligibility." This seems a different concept than the erroneous view of the court below, which we have just examined, that petitioner had the burden of proving that he was not a member of the Communist Party.

The error of the Board's holding is that it imports into the statute a requirement that is not there. The statute provides the terms of eligibility, none of which is that the alien cooperate with the Service in its investigation of him to determine whether he is disqualified by reason of Communist Party membership. It does not follow, as the Board supposed, that because the Service and the Board have a "right . . . to know all pertinent information," the alien has a duty to supply such information regarding a subject on which the burden of proof is on the Service. On the contrary, even if a general obligation to cooperate were read into the statute, this would be overridden by the Fifth Amendment, which, when claimed, gives a privilege of silence.

The choice is between giving respect to the constitutional privilege or extending the statutory language in order to bolster the legislative policy of the anarchist deportation act, as amended.[2] On the one hand, "The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them." *Grunewald* v. *United States*, supra, at 425-26 (concurring opinion). On the other, if the choice is for the privilege, suspension may, on rare occasions and despite the investigatory resources of the government, be granted to persons who might actually be disqualified. The Founders, however, enshrined the privilege even at the cost of permitting serious crimes to go unpunished. Surely, then, the policy of the privilege deserves greater deference than that behind the dubious provisions for the expulsion of alien Communists.[2] More-

[2] In *Galvan* v. *Press*, 347 U.S. 522, 530, the Court, though sustaining deportation for Communist Party membership, stated that the enactment "strikes one with a sense of harsh incongruity."

over, "It is precisely at such times—when the privilege is under attack by those who wrongly conceive of it as merely a shield for the guilty—that governmental bodies must be most scrupulous in protecting its exercise." *Quinn* v. *United States*, 349 U.S. 155, 164.

The Court has held that a city may discharge an employee for refusing on constitutional grounds to answer questions on Communist membership asked, or directed to be answered, by the city. *Lerner* v. *Casey*, 357 U.S. 468; *Beilan* v. *Board of Education*, 357 U.S. 399; *Nelson* v. *Los Angeles*, No. 152, Oct. Term, 1959, decided Feb. 29, 1960. These cases go no further than sustaining state power to discharge an employee for a non-cooperation claimed to evince a lack of candor or insubordination. The initial question here, however, is what Congress did, not what it could have done. It prescribed only certain factors which would disqualify an alien for suspension. It did not prescribe non-cooperation with the Immigration Service as a disqualification. And, in the interests of the constitutional privilege, no such requirement should be erected by interpretation.

Nor does the Congress have the power to do what *Lerner*, *Beilan* and *Nelson* permitted the states to do. Those cases do not directly collide with the privilege against self-incrimination because the Court has held that the privilege is not binding on the states. But it flies in the face of the Fifth Amendment for the federal government to inflict adverse, discriminatory consequences on account of a privileged silence. For such action is a compulsion on the alien to incriminate himself.

III. PETITIONER'S CLAIM OF THE PRIVILEGE WOULD NOT BE A VALID GROUND FOR REFUSING SUSPENSION IN THE EXERCISE OF THE ATTORNEY GENERAL'S DISCRETION.

If an alien satisfies the statutory preconditions and is not disqualified by reason of the anarchist deportation act, the Attorney General has discretion as to whether to grant suspension. His exercise of this authority is reviewable for abuse of discretion. *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 77-78; *Caddeo* v. *McGranery*, 202 F. 2d 807; *Melachrinos* v. *Brownell*, 230 F. 2d 42, 45; *Mastrapasqua* v. *Shaughnessy*, 180 F. 2d 909, 1002; *United States ex rel. Partheniades* v. *Shaughnessy*, 146 F. Supp. 772.

The Special Inquiry Officer and the Board of Immigration Appeals did not exercise the discretion committed to the Attorney General because they held petitioner ineligible for discretionary consideration. The court below took a like view. The Adjudications Division of the Service, however, approved the recommendations of the Special Inquiry Officer on the ground that suspension should be denied as "a matter of administrative discretion" because of petitioner's reliance on his constitutional privilege (R. 74).

Since this ruling was made only in an intermediate administrative appeal, we doubt that this case presents in the present posture the question of whether the Attorney General's discretion was abused. The fact is that discretion was not exercised by the Attorney General's last delegate, the Board of Immigration Appeals.

But if the question of discretion is here, then it was unconstitutional, and at a minimum an abuse of discretion, to deny discretionary relief solely because petitioner had relied on his constitutional privilege. Since administrative officials also operate under the Consti-

tution, they are no freer than the courts to denigrate the constitutional policy by penalizing or discrediting an alien for exercising his constitutional right. An alien's non-cooperation may be a valid ground for denying him discretionary relief, but not when the non-cooperation is the exercise of a constitutionally guaranteed privilege.

In conformity with this principle, *United States ex rel. Belfrage* v. *Shaughnessy*, 212 F. 2d 128, held that an administrative denial of bail pending deportation proceedings was an abuse of discretion because based in part on the alien's claim of the privilege. Similarly, the amount of judicial bail may not be affected by a defendant's reliance on the privilege. *Spector* v. *United States*, 193 F. 2d 1002, 1005-1006.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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